No 26 June 2002

IPBA JOURNAL

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INTER-PACIFIC BAR ASSOCIATION

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IPBA News

Legal Update

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The President's Report

Hong Kong Annual Meeting and Conference

Since taking up the Presidency, I have looked back on the Hong Kong conference with tremendous pride and satisfaetion. Not only because it attracted the largest ever eontingent of partieipants at an IPBA event (over 870 delegates from 67 jurisdictions), but most importantly, we are all ad idem agreed that an extraordinary time was had by everyone.

We were blessed with the honor of having the eonferenee offieially opened by Hong Kong's Chief Executive, Mr. CH Tung and were further honored with the presence of Mr. Zhang Fu Shan, the Minister of Justiee of the People's Republic of China, who made a special trip to Hong Kong for the oecasion. The occasion represented the first time sinee sovereignty reverted to the motherland that the Minister of Justice had come to Hong Kong. The Chief Justice, Mr. Andrew Li, gave a speeeh based on our conferenee theme "The Dragons Come of Age: Asia's Role in Global Trade", and very suceinetly took us through how Asian eeonomies have adjusted resiliently to the financial erisis in the last four years. Our illustrious panel of plenary speakers, representing chief officers of regulatory bodies, eonglomerates and multinationals in Hong Kong and Greater China, examined and eompared the institutions and systems of corporate governance and the various ways of doing business under the "one country, two systems" poliey.

Besides dancing the night away at Café Deco and trying our luek at the races, our formal banquet at the grand hall of the Hong Kong Convention and Exhibition Centre (the site of Hong Kong's handover ceremony in 1997) and the reception at Government House were memorable events. The committee programs reeorded outstanding attendance and our eommittee ehairs have been deservedly rewarded for their hard work.

Post Conference Beijing Delegation

A number of IPBA officers and myself joined the delegation, which included some 40 partieipants, that traveled to Beijing. We were warmly reeeived by the Ministry of Justice, the body which graciously sponsored our delegation. We thank them for their impeccable arrangements and the tremendous support of the Liaison Offiee of the Central People's Government in the Hong Kong SAR, whose hard work made the program possible. We were also given a detailed briefing by MOFTEC as well as justices of the Supreme Court and the State Council. Question times were both spontaneous and rewarding to the participants. Dinner at the China Club, the former palace of a Manchurian prince and the famous site where Mr. Deng Xiao Ping uttered his famous pronouneement: "It does not matter whether it is a blaek or white eat as long as it catehes mice", was a novel experienee, in particular for first time visitors to China.

Dublin, Ireland, ILO and IBA meetings

Since taking office, I have in my capacity as President represented the IPBA at the International and Regional Bar Association (ILO) meeting held in Dublin, Ireland on 31 May 2002. I was given the floor by the chair of the Business Law seetion of the IBA, Mr. Jacques Buhart (for which I express our gratitude), at a meeting of committee and forum officers, where I gave an overview of the IPBA and our plans for the eoming year. In rcturn a number of IBA committee chairs and vice chairs expressed an interest in working togcther with us on a variety of IPBA initiatives, and accordingly, I have put them in touch with the relevant IPBA members and officers.

Corporate Counsel Committee Initiative

We had over 100 attendees for our "stand alone" Corporate Counsel Forum in Hong Kong. This proves that there is a strong need for us to continue to support this initiative. Prior to and in preparation for the Hong Kong conference, I attended the IBA's first ever Corporate Counsel Conference which was held in Paris in February this year. To increase the awareness of this initiative, I have also managed to secure for the IPBA free advertising rights in the US *Corporate*

Counsel magazine. We hope to have members' input on how to further take this initiative forward. I will ensure a similar forum takes place at our Annual Conference in 2003. Do write in and let me know if you would like to help.

Autumn in Paris

It is with much enthusiasm that I invite you to Paris for our IPBA seminar entitled: "Prospects for the development of business relations between countries of the Asia-Pacific Region and the European Union". The seminar will take place on 23 September 2002. We are honored to be co-organizing it with the French National Committee of the International Chamber of Commerce (ICC). Our jurisdiction Council member from France, Mr. Jose Rosell, has worked hard to put together an excellent program. It will be followed by a cocktail reception at the headquarters of the ICC, an occasion which offers an opportunity to meet with members of the ICC and other leading lawyers from the French bar.

Apart from the wonderful prospect of enjoying the delights of Paris in autumn, this meeting helps fulfill the IPBA's long held desire to raise our profile in Europe and enable our European members to attract new recruits to the IPBA.

See you in Paris, and I do encourage members from your jurisdiction to join us.

My Fondest Appreciation

On a closing note, I write to thank you for bestowing upon me the honor and responsibility of leadership of the IPBA. I am dedicated to ensuring that the IPBA continues to grow and thrive, and will continue to stand as a pre-eminent organization of business lawyers with a global focus.

Vivien Chan, JP
President

The Secretary-General's Report

The first year of my duties as Secretary-General has been quite remarkable, if judged from the wide-ranging issues, from the sublime to the ridiculous, which have occurred during my watch. What is evident is that the internet has transformed this responsibility into one of real time decision making and information sharing. Not a day passes without the Secretary-General receiving half a dozen or so emails from officers and the Secretariat each of which demand immediate decisions or clarification.

The highlight of the year must be the Hong Kong Annual Conference. This was a slick and highly professional production in a world class venue, the Hong Kong Convention and Exhibition Centre, graced by the support and participation of Hong Kong's elite from the Chief Executive to the Secretary of Justice with black-tie events, dancing on the Peak and drinks at the former Governor's residence. All with an élan which is characteristic of a global city like Hong Kong. Whilst members took in the delights of Hong Kong, the Officer and the Council continued long deliberations on the critical issue of revitalizing the IPBA and improving the quality and performance at all levels.

Leadership Selection

It is a truism that the strength or weakness of any organization lies in the quality of its leadership and succession process. Whilst the IPBA is an open organization which allows any member to participate, it is critical that those with ability, energy and commitment be selected.

Committee Leadership

All nominations for Committee vice-chairs would from now require a nomination form in which the Committee chair is required to describe the candidate's credentials, understanding of the minimum deliverables and his consent. These forms are to be submitted to the Committee and Program Coordinators who in turn will submit their written nominations to the Nominating Committee.

The Officers endorsed the broad principle that the future appointment of officers should be made on the basis of evaluated past performance of candidates who have previously served in Committee, jurisdiction or other IPBA roles. We will introduce an evaluation process of all positions at the expiry of their terms so that a record of information is available to the Nominating Committee.

We need at all times to ensure that all levels of leadership are broadly representative of all the major and relevant jurisdictions of the IPBA, reflect the broad spread of law firms as well as of leading and emerging lawyers. The legacy left to me by Patrick Sherrington when I became his successor Committee chair was highly valuable. Patrick had prepared a tabulation of all IPBA conferences in which he tracked the representation of each law firm and lawyer against which the Committee chair could eliminate the risk of over-representation of the same firms and lawyers as speakers. The Secretariat will prepare a similar tabulation for the Committee and Program Chairs.

Jurisdictional Members

The role of jurisdictional members is of ever-increasing importance. Jurisdictional members are requested to provide the Committee and Program Chairs with the names and contact details of the leading law firms and leading practitioners in each Committee area. Jurisdictional members should be promoting and enlarging membership from their jurisdiction. The should be organizing annual domestic events to promote the IPBA and to elicit expressions of views from their members on IPBA events and issues so as to be able to express them at the Council meetings.

Officers

The nomination process for Officers is also a critical process. Apart from the Vice President who is selected in connection with the hosting of an annual conference, the Secretary-General,

Committee Coordinator, Program Coordinator and Publications Chair are the key officer positions for which we need to tighten selection based on performance. The Nominating Committee has, upon the initiative of past President Nobuo Miyake embarked on a process of closer scrutiny and interviews with potential candidates. Further, the generation of written evaluations and nominations will provide better information against which more informed nominations can be made.

Committees: Branding and Relevance

The Program and Committee Coordinators, Rory Radding and Ken Stuart have embarked together with Teresa Cheng on a preliminary review of the number of Committees and their remit. I have challenged them to think in broad terms, bearing in mind that the IPBA is an Inter-Pacific Bar Association and accordingly our branding should convey an interest in current international and regional issues in the broad areas of legal practice. We should accordingly be thinking along: Investment, Trade, Finance, Communications, Infocommunications, Environment and Legal Profession, within which general as sub-committees of specialization may be accommodated. We need to be creative and respond to our members' needs and interests. The attendance figures and evaluation forms that were distributed at the various committee programs in Hong Kong will provide useful consumer feedback.

Structural Priorities

My priorities for this year are to commission and receive a report from external advisers on the optimal structure and location of the IPBA, to commission and receive a report from external advisers on the financial accountability and reporting lines for all IPBA sponsored projects, and to work with our webmaster Jim FitzSimons to make available on line (*i.e.* on the IPBA website) more organizational and procedural information including our Constitution and officers manuals.

It would be remiss of me, if I did not express my deepest appreciation to Nobuo Miyake, our immediate past President. Without his institutional and cultural knowledge of the IPBA and its origins and goals, I would have had an impossible task in navigating the IPBA through some of the very complex legacy decisions we have had to make in the best interests of the IPBA and its future. Without leadership and a willingness to take on hard decisions when necessary, the organization is in danger of paralysis and decline. I look forward to continuing to work with Nosei on the Nominating Committee and with Vivien, our energetic new President towards our continuing goal of an ever-improving and successful Inter-Pacific Bar Association.

Philip Pillai
Secretary-General

Inter-Pacific Bar Association

12th Annual Meeting and Conference

3-7 May 2002

3 May 2002

The Guests of Honor offering a toast at the Weleome Reeeption. *From left to right:* Ms. Vivien Chan, IPBA President and Chair of the Host Organising Committee; Mr. Zhang Fusen, Minister of Justiee of the People's Republie of China; The Hon. Mr. Tung Chee Hwa, Chief Exeeutive of the Hong Kong Speeial Administrative Region; The Hon. Ms. Elsie Leung, Seeretary for Justice of the Hong Kong Speeial Administrative Region; Mr. Nobuo Miyake, IPBA Immediate Past President

M.S. Lin Scholars at the New Members & M.S. Lin Scholars Reception

The Hon. Ms. Audrey Eu, SC, JP, Member of the Legislative Counеil of the Hong Kong Speeial Administrative Region *(left)* at the Women Lawyers Reeeption

4 May 2002

Corporate Counsel Forum:
Mrs. Carrie Yau, JP, former Secretary for Information Technology and Broadcasting of the Hong Kong Special Administrative Region, and
Mr. Nobuo Miyake, IPBA Immediate Past President

Plenary Session.
From left to right: Mr. Ming Siu, Chairman & CEO, SMEloan Hong Kong Limited; Dr. Y.C. Chow, Chairman & Managing Director, Chevalier Group; Mr. Ian Perkin, Chief Economist – Economic & Legal Affairs, Hong Kong General Chamber of Commerce *(moderator)*; Mr. David Carse, Deputy Chief Executive, Hong Kong Monetary Authority; Ms. Cordelia Chung, General Manager, IBM China/Hong Kong Limited; Ms. Marjorie Yang, Chairman, Esquel Group

Keynote Presentation:
The Hon. Mr. Andrew Li, Chief Justice of the Hong Kong Court of Final Appeal

The Guest of Honor at the Conference Dinner:
The Hon. Mrs. Anson Chan, GBM, CBE, JP, former Chief Secretary for Administration of the Hong Kong Special Administrative Region

4 May 2002

Conferenee Dinner: lovely ehildren at "Piu Sik" parade, a traditional eultural performanee originated in Cheung Chau, an outlying island of the Hong Kong Speeial Administrative Region. The term "Piu Sik" means "floating eolors".

5 May 2002

IPBA President and Immediate Past President, Stewards and other dignitaries on the IPBA Cup Raee Day

Coektail Reeeption at Cafe Deeo on the Peak. which rises more than 550 meters above Vietoria Harbor. At the Peak, one ean eapture the speetaeular cityseape and the justly famous night seenery of Hong Kong.

6 May 2002

IPBA Officers at the Annual General Meeting

8-11 May 2002

The delegation at the Post-Conference Beijing Program

9 May 2002

Beijing Programme: Delegates meeting with senior officials from the Ministry of Foreign Trade and Economic Corporation (MOFTEC) of the People's Republic of China

ICC-FRANCE
COMITÉ NATIONAL FRANÇAIS
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IPBA
INTER-PACIFIC BAR ASSOCIATION

PROSPECTS FOR THE DEVELOPMENT OF BUSINESS RELATIONS BETWEEN COUNTRIES OF THE ASIA-PACIFIC REGION AND THE EUROPEAN UNION

Seminar co-organized by the Inter-Pacific Bar Association (IPBA) and
the French National Committee of the International Chamber of Commerce (ICC France)

Monday, 23 September 2002

International Headquarters of the International Chamber of Commerce
38, cours Albert 1er-Paris 8ème

PROGRAM

10:00-10:20 Welcome addresses
Ms Vivien Chan, President, IPBA
Mr François de Laage de Meux, Chairman, ICC France

MORNING SESSION

10:20-11:05 1. The implications of China's entry into the World Trade Organisation
Moderator: Mr Philip Pillai, Secretary General, IPBA
Panel debate:
- Representative of the Chinese Ministry of Finance (MOFTEC) in charge of relations with the European Union
- Mr Francis Delemotte, Chairman, International Trade Policy Commission, ICC France; Head of International Trade Department, Union of Chemical Industries (UIC), Paris La Défense
- Me Patrick Vovan, Vovan & Partners, Paris

11:05-11:20 Questions from the floor
11:20-11:35 Coffee break

11:35-12:05 2. Legal aspects of infrastructure projects in India
Moderator: Mr Nobuo Miyake, Past President, IPBA
Panel debate:
- Mr Suhail Nathani, Economic Laws Practice, Mumbai
- Mr Marc Frilet, Frilet & Partners, Paris

12:05-12:30 Questions from the floor
12:45-14:15 Luncheon
Cercle France-Amériques, 9/11 avenue Franklin Roosevelt, Paris 8ème

AFTERNOON SESSION

14:30-15:10 3. Technology transfers in the Asia-Pacific region
Moderator: Mr Rory J Radding, Pennie & Edmonds, New York
Panel debate:
- Mr Junichi Yamazaki, Miyake & Yamazaki, Tokyo
- Mr Parvin Anand, Anand & Anand, New Delhi
- Mr Wang Jian Ping, King & Wood, Beijing

15:10-15:30 Questions from the floor
15:30-15:45 Coffee break

15:45-16:45 4. Dispute resolution in the Asia-Pacific region
Moderator: Mr José Rosell, Rosell & Associés, Paris
Panel debate:
- Mr Yukukazu Hanamizu, Yuasa & Hara, Tokyo
- Ms Teresa Cheng, Des Voeux Chambers, Hong Kong
- Mr Shishir K Dholakia, Lawyers Chambers, New Delhi
- Representative of the ICC International Court of Arbitration

16:45-17:15 Questions from the floor
17:30-18:45 Cocktail Party (ICC Headquarters)

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PROSPECTS FOR THE DEVELOPMENT OF BUSINESS RELATIONS BETWEEN COUNTRIES OF THE ASIA-PACIFIC REGION AND THE EUROPEAN UNION

23 September 2002

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The Law on Money Laundering

In an attempt to combat money laundering and related activities, the Indonesian government has recently passed legislation that provides for various offenses and imposes extensive obligations on financial service providers in the country

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The Law on Money Laundering No. 15 of 2002 (the "Law") has come into effect since 17 April 2002. The Law focuses on transactions involving funds of Rp. 500 millions or more which are directly or indirectly derived from the crimes of corruption, bribery, goods smuggling, illegal immigrants, manpower smuggling, banking crimes, narcotics trading, psychotropic trading, arms trafficking, kidnapping, terrorism, theft, embezzlement, deceit, and trading of slave, child, and woman. The elucidation of the Law broadens the type of the crimes to include any other white-collar crimes. However, money derived from gambling activities, which was included in the category of crimes during the drafting process of the Law, is not stipulated under the Law.

Liability for Money Laundering Activities

Any individual or corporation that deliberately places, transfers or uses any assets derived from the abovementioned activities including for payments, gifts, contributions, deposits, or exchanges, shall be liable to imprisonment for 5 (five) to 15 (fifteen) years and a fine amounting from Rp. 5 billion to Rp. 15 billion. The same sanctions will also be imposed to anyone who deliberately hides the assets or makes the track records of the assets obscure. These penalties shall also be applicable to the party with whom such individual or corporation conducts the transactions.

Where the activities are conducted by the directors of a corporation for and on behalf of the company, the abovementioned sanctions will be imposed on both the directors and the company. The company may be released from liability if the activities are not within the scope of business of the company. Sanctions that may be imposed on the company include a fine amounting to 133.33% of the maximum fine, revocation of the business license, and/or dissolution of the company followed by liquidation.

Reporting Obligations

The Law imposes an obligation on financial service providers (*e.g.* banks and securities companies) to report to the Center for Reporting and Analyzing Financial Transactions (*Pusat Pelaporan dan Analisis Transaksi Keuangan* ("PPATK")) any suspicious transactions or transactions involving a total amount of Rp. 500 million or more, either accomplished in one transaction or more within 1 (one) working day. The report must be conducted at the latest 14 (fourteen) working days as of the date on which the financial service provider notices such transactions or as of the date on which the transactions take place.

Inter-bank transactions, transactions involving the government, transactions with the central bank, payroll payments and pension payments are among the transactions exempted from the reporting obligation. Other transactions are requested by the financial service providers to be exempted transactions due to their characteristics, such as routine deposits by toll road operators or by supermarket operators, which are always conducted in cash and involve huge amount of money. These transactions, if so approved by the PPATK, will also be exempted from the reporting obligation.

The Law also requires anyone carrying cash (in Rupiah currency) in the amount of Rp. 100 million or more out of or into the Indonesian

territory to report to the Custom Office. The Custom Office shall then within 5 (five) working days report to the PPATK.

Functions, Powers and Duties of the PPATK

The PPATK shall be an independent agency which will be established within 1 (one) year as of the promulgation of the Law to prevent and eliminate money laundering. The PPATK shall be responsible to the President. The head and deputies of the PPATK will be appointed by the President upon recommendation of the Minister of Finance. The functions and duties of the PPATK include:

- Collecting, keeping, analyzing and evaluating any information obtained;
- Supervising the exemption lists provided by financial service providers;
- Stipulating the procedure of reporting suspicious transactions;
- Advising and assisting the competent authority in respect of the information obtained;
- Issuing guidelines and publications for financial service providers, and providing assistance in detecting any suspicious behavior of customers;
- Providing recommendation to the government on effort to prevent and eliminate money laundering;
- Reporting any analysis result indicating money laundering to the police or attorney general's office within 3 (three) working days from that result being made available;
- Submitting periodical reports (once every 6 (six) months) on the analysis result on the financial transactions to the President, parliament and the institution authorized to supervise financial service providers.

To facilitate discharge of the above duties, the PPATK is authorized to request and receive reports from financial service providers as well as information from the public prosecutor regarding the investigation or prosecution of reported money laundering activities. Furthermore, the PPATK is authorized to audit financial service providers on compliance with the Law, and to provide exemption from the reporting obligation of transactions involving a total amount of Rp. 500 million or more, either accomplished in one transaction or more within 1 (one) working day.

Legal Proceedings

In general, the investigation, prosecution and examination processes that follow from money laundering activities are subject to general criminal procedure. Any information in verbal, sent, received or stored electronically may serve as evidence besides the evidence provided in the Criminal Code. Other documentary information, including information in writing, audio, picture, map, draft, photograph, letter, symbol, sign or any other meaningful perforations, may also serve as evidence.

The Law provides that any parties who report money laundering activities and parties who testify in legal proceedings arising from money laundering will be protected from any possibility of threat that may harm them, including their relatives and assets.

Growth of Hypermarkets Shackled

The recently introduced guidelines on the establishment of hypermarkets, while seeking to protect local suppliers, have created a shroud of uncertainty over the hypermarket industry in Malaysia

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The introduction of the Guidelines on the Establishment of Hypermarkets ("Guidelines") by the Ministry of Domestic Trade and Consumer Affairs ("MDTCA") on 24 April 2002 has cast a cloud of uncertainty over the burgeoning hypermarket industry in Malaysia. At present the hypermarket chains operating in Malaysia are Carrefour, Giant, Makro and Tesco (see article entitled "Government proposes to limit on foreign hypermarkets", *Star Online*, 4 April 2002).

In a prelude to the unveiling of the Guidelines, the Minister of Domestic Trade and Consumer Affairs announced that guidelines were necessary to protect local traders whose businesses had been affected by hypermarkets. (Coincidentally, the Government of Thailand expressed similar reservations on the effect of hypermarkets on local suppliers and retail traders: see "Thailand Seeks to Curb Hypermarket Operators", *Asian Wall Street Journal*, 24 June 2002.) The Minister also alleged that local suppliers were losing out as a result of the high charges imposed by hypermarket chains for access to display shelf space (see *Star Online*, 4 April 2002).

The Guidelines seek to impose a number of conditions on hypermarket operators. Some of the conditions are as follows:

- The operator must have a minimum paid-up capital of RM50 million;
- A hypermarket is not permitted to operate within a radius of 3.5 km of residential areas and town centers;

- Only one hypermarket is permitted to operate for every 350,000 residents;
- A hypermarket must be operated on a freestanding basis at the fringe of a town and must be equipped with facilities such as car parks, restaurants and cash dispensing machines;
- A socio-economic impact study, including its impact on existing retail businesses must be carried out before an application to open a hypermarket is considered;
- The business floor space must not be less than 8,000 square meters;

Photo by: Barbara Henry

- A hypermarket is required to have one check-out counter and 50 car parks for every 1,000 square meters of business floor space;
- Business areas should be provided for supporting services at reasonable rentals.

The aim of this article is to examine whether the Guidelines succeed in achieving the objectives of the MDTCA and the repercussions arising therefrom.

Objectives of the Guidelines

To carry out a proper evaluation of the Guidelines, it is necessary to reiterate the objectives which the MDTCA aims to achieve, that is:

1. Protect local traders whose businesses have been affected by hypermarkets; and
2. Assist local suppliers to secure more display shelf space at reasonable costs.

Competitive Advantages of Hypermarkets

The bulk purchasing power, economy of scale and efficiency of hypermarket operations translate into competitive advantages that cannot be matched by local traders. By and large, these advantages enable hypermarkets to sell identical or similar products at lower prices than the neighborhood grocery stores.

Hypermarket: Descriptive or Prescriptive?

The phrase "hypermarket" originates from a French word "*hypermarche*". It describes "a very large self-service store, usually situated outside a town, having an extensive car park and selling a wide range of goods" (see *The Oxford English Dictionary* (New Edition)).

It is interesting to note that, although the Guidelines do not define a hypermarket, they adopt some of the characteristics of the Oxford dictionary definition by providing that a hypermarket must:

1. have a minimum business floor space of 8,000 square meters;
2. not be located within a radius of 3.5 km of a residential area or town center; and
3. have 50 car parking bays for every 1,000 square meters of business floor space.

For good measure, the Guidelines also require a hypermarket to be operated on a freestanding basis and not as part of a larger commercial complex.

The obvious question which comes to the mind of a legally-trained person is this – would a retail outlet be exempted from complying with the Guidelines if it is established on a bona fide basis with a floor area of less than 8,000 square metres? It would appear that this question must

be answered in the affirmative, and the corollary thereof is that the outlet may operate without regard to the geographical, demographical and operational restrictions imposed on hypermarkets. If such outlet forms part of a group of companies which operate hypermarkets, the outlet would still be able to enjoy substantially the competitive advantages which hypermarkets enjoy over the neighborhood grocery shops without being burdened by the restrictions in the Guidelines.

There is at least one retail group in Malaysia which has, for several years prior to the introduction of the Guidelines, operated an integrated chain of mini-markets, supermarkets and hypermarkets. This group and the existing operators of large supermarket chains in Malaysia which enjoy similar competitive advantages could inadvertently become the beneficiaries of the Guidelines if hypermarket operators are precluded from adopting a similar business model.

Access to Display Shelf Space

The Guidelines attempt to assist local suppliers by requiring hypermarkets to provide business areas at reasonable rentals to support services. The MDTCA has, to this extent, achieved its objective of assisting local suppliers to gain greater access to display shelf space at reasonable rentals. However, the absence of any prescription as to the proportion of floor space or display shelf space to be allocated for this purpose and as to what constitute reasonable rentals render it difficult to determine whether a hypermarket operator has complied with this condition. Perhaps this potential area of conflict may be avoided through a process of consultation between regulator and operator.

Conclusion

While the objectives of the MDTCA are laudable, the wisdom of imposing artificial trade barriers that interfere with freedom of trade and the forces of Darwinian selection in economics is questionable.

At a cursory glance, the Guidelines achieve the MDTCA's avowed objectives of protecting local traders and assisting local suppliers. However, the Guidelines raise as many issues as they resolve and have caused uncertainties within the industry. The MDTCA should consider the feedback from the industry on the Guidelines and, where appropriate, review, clarify and/or amend the same. Until these uncertainties are satisfactorily resolved or clarified, the development of the hypermarket industry in Malaysia will be shackled.

Vietnam's Stamp of Approval

In Vietnam, the importance of the organizational seal cannot be emphasized too strongly; indeed, the relevant law contains detailed provisions governing various aspects of the organizational seal, including its formation, use and misuse

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The law has changed since then. Even though the official organizational seal is widely used in Vietnam, its significance is still not fully understood by foreign businessmen. The organizational seal is essential to ensure the authenticity of a document. Even the signature of the general director, when used alone, is insufficient in cases where an official act of the organization is required.

Right to a Seal

The most important law which deals with the seal and its use is Decree of the Government No. 58/2001/ND-CP dated 24 August 2001 ("Decree 58"), which replaces Decree 62 CP issued on 22 September 1993. As set forth in article 3 of Decree 58, only the seal of the government, National Assembly, ministries, courts, people's committees, people's councils and other governmental bodies can be engraved with the national emblem. Local or foreign organizations wishing to use a special design or foreign characters on their seals must comply with regulations of the Ministry of Public Security.

An organization's seal is authorized by that organization's higher supervisory authority, usually a government organization. The Ministry of Trade authorizes the seal in the case of a resident representative office. In the case of a foreign-invested company, the Ministry of Planning and Investment ("MPI") authorizes the seal under the Foreign Investment Law. The head of an organization (a foreign-invested enterprise, a local company, *etc.*) is responsible to take back the seal and hand it over to the seal-issuing body in case the organization is merged or dissolved (article 7).

Not all organizations are entitled to have a seal. The law lists the organizations which can have their own seal (articles 3 and 4). They include a private or publicly created legal entity vested with juridical status, a foreign-invested company and a locally-owned company.

Use of the Seal

Under Decree 58, an organization is authorized to have only one seal. In case an organization needs another duplicate which bears the same characters or design as the first seal, permission of the competent authority must be obtained. In this case, the second seal must bear a special signal that is distinctive from the first seal (article 6.1). A seal exists in one of three forms: the ink seal, raised seal or one imprinted on sealing wax (article 2). Decree 58 also specifies that the ink used for an ink seal must be in red color (article 6.5). However, the purposes for which a seal may be used are not defined. In normal practice, an ink seal is used under most circumstances, while a raised seal or sealing wax is used for specific purposes. For example, schools or universities affix raised seals on certificates, diplomas and degrees. Sealing wax is sometimes used by a notary public.

The seal of a government office certifies the validity and authenticity of a government document and of the act to which it refers (article 1). The same is true with respect to a commercial enterprise. For example, if a managing director or general director acts on behalf of a private or government enterprise, his/her signature on a document must be accompanied by the seal. Indeed, the signature must be affixed in a particular way (the seal is required to cover one-third of the signature). If the managing director or general director engages in his/her own business – even though the business purports to be conducted in the name of the company – use of the seal of the company has no validity vis-à-vis the organization; however, as will be discussed later, such use will have consequences for the signatory. Moreover, the person who misuses the seal is criminally responsible.

Contracts, deeds and official letters must bear a seal along with the authorized signature, which

is why, in contractual matters, telephone conversations should be confirmed by a letter bearing the signature and the seal. A facsimile message can convey a signature and a seal and is preferable to verbal communications.

Exempted from the sealing requirement are certain internal memoranda and notices; the personnel unit can be expected to be familiar with the signature of someone conducting the internal matters of the organization.

As a matter of practice, the seal of a government organization is usually held by the administrative division or the secretariat, and is normally placed in the custody and control of a person who, under the law, is responsible for holding and using the seal (article 6, paragraph 4).

The office, through which passes all incoming and outgoing mail, can be expected to have clear instructions on the application of the seal, and it is in charge of affixing the seal to documents already signed by an authorized person. Decree 58 is silent on whether affixing a seal on a blank form, that is before the signature is placed, is expressly prohibited. It may be implied that affixing a seal on a blank form is permissible in certain cases, provided that the seal holder is responsible for such act.

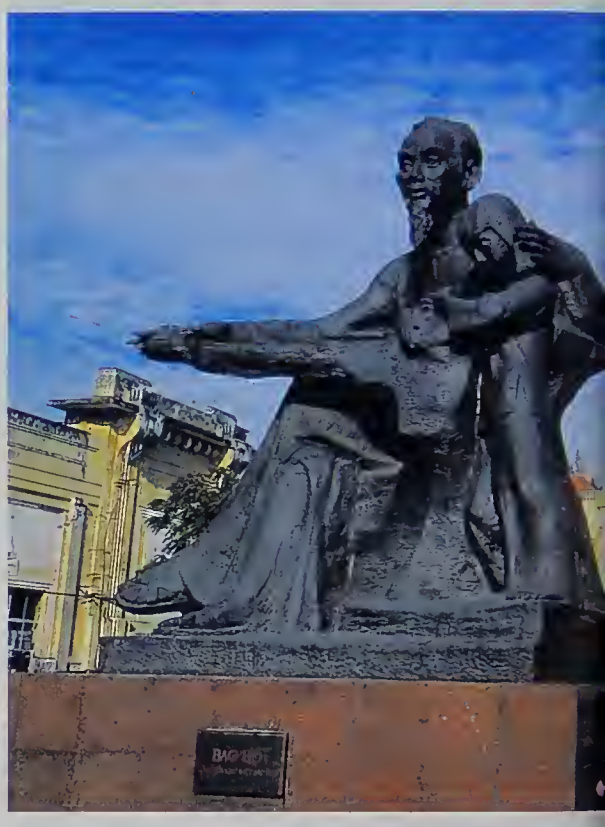
Under the law, when the person authorized to sign a document on behalf of an organization and to affix the seal of the organization has been dismissed, or when the organization has been dissolved, the seal must be passed on to his/her successor or to a senior administrative body, as the case may be.

Official Authority to Use the Seal

The same principle applies to a Vietnamese company, where only the chairman of the board of management and/or his/her delegate, normally the managing director, has the right to use the seal. Even the main shareholder cannot use the seal because, as a shareholder, he/she is not authorized to represent the company. It is the officers authorized by the board (or other authority in the case of a state-owned enterprise) who are permitted to act on behalf of a company.

The question of who can bind the company to a contract, deed or official letter, as the case may be, by signing his/her name and affixing the seal, parallels closely the assignment of authority to officers of the company. For example, someone with authority in personnel matters could be given authority to sign and affix the company seal on personnel documents. Beyond that, such person has no power to act on behalf of the organization. Even the general director's authority to affix the seal and sign on behalf of the company is not unlimited. The board of management can set limits on that authority.

The seal is one factor to consider in determining whether a document is properly executed. The more fundamental point – normally an internal matter – is to know what authority each signatory has been given. The extent of the authority should be recorded in the internal regulations of the company, in a company resolution or in a power of attorney.



The board of management can require dual signatures together with the seal in certain circumstances. It is common in financial matters that the general director and the chief accountant both sign – and, of course, affix the seal.

Does a foreigner have the right to bind the company and affix the seal? It depends on the position of the foreigner (*e.g.* whether he/she is a managing director or just a foreign employee) or the purpose of work. Under the law, a foreigner has such a right if he/she is a managing director of a foreign-invested enterprise. Depending on the scope of work engaged in by a foreigner, who is not a managing director, such a foreigner is authorized to sign a document and affix the seal. For example, a foreign chief accountant of a foreign-invested enterprise may sign and affix the seal on a document relating to his scope of work.

along with the managing director who may also sign and affix the seal. The marketing manager of a foreign-invested enterprise is authorized to sign and seal a certain type of document. The chief of a representative office or a branch of a foreign company in Vietnam has the right to use the seal in connection with the authorized activities of that office or branch. The representative office of a foreign company is not allowed to engage in commercial activities. Hence, the chief of the representative office may not sign a commercial contract on behalf of that office. However, if so

authorized, he can sign on behalf of the foreign company. The same rules apply to delegation of authority by the board of management of a Vietnamese company.

A similar question arises in the case of a foreigner working for a Vietnamese company formed under Vietnam's Enterprise Law. If a foreigner is employed by the company to carry out a particular task, a case can clearly be made for allowing the seal to be used in connection with the performance of that task. If the foreigner is authorized to sign as a dual signatory, that too would be allowed. Certainly, for example, it applies with respect to bank checks, if the foreigner is assigned financial responsibilities. To be effective, a power of attorney from a local company officer conferring authority on a foreigner must be signed before a notary. However, if the power of attorney were to grant sweeping authority in favor of a foreigner, it is less likely that a notary would approve that power.

Misuse of the Seal

The law prohibits an official from holding the seal personally. The seal must remain in the organization's office (article 6, paragraph 4). The history of this regulation can be traced to unfair practices in the past, whereby a government official, who carried the seal in a pouch attached to his belt, would take the seal with him when he left his office. In his absence, the business of the office ceased.

Today, it is common for a government or company official who signs an important document (*e.g.* a contract) outside his office not to carry the seal with him. Instead, the documents are brought back to the office in order to have the seal affixed. In exceptional cases, the head of a company or an organization may carry the seal with him outside of the office, in which case he is responsible for its care (article 6, paragraph 4).

There is only one seal for each agency or organization. A branch is authorized a separate seal which specifically identifies the branch. The seal is made by the public security office, *i.e.* the police. The police will only engrave a seal upon submission of a proper application accompanied by the license of the organization concerned.

Making a duplicate is considered a falsification, except with special permission, and is punishable by law (article 13). Naturally, misusing a seal is likewise punishable by law. Articles 267 and 268 of the Criminal Code passed on 21 December 1999 imposes penalties for the falsification, usurpation, sale and purchase, or destruction of the seal and documents of government authorities and social organizations. The penalties, including fine and imprisonment, vary from case to case, depending on the gravity of the offense in question. The accused may be sentenced to a fine ranging from one million dong to 50 million dong, "re-education" or imprisonment for five years.

Conclusion

The seal gives legitimacy to a signature; moreover, it has symbolic importance. The seal and the organization are often thought of as one, and the seal signifies continuity of the organization. Heads of organizations come and go. The seal, on the other hand, exists as long as the organization exists.

[*Note:* This article is an updated version of an article written by Sesto E. Vecchi and Ngo Ngoc Lan and published in *AsiaLaw* in 1995 (Issue No. 3, 30 April 1995).]

Integration and Partnering with Clients

There is a myriad of forms through which a law firm and its corporate client can work together to deepen understanding of each other and strengthen the relationship of mutual trust and confidence

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Introduction

For an international company such as ITOCHU Corporation, it has become increasingly more important to retain as its outside legal counsel a law firm that understands our decision-making process and needs, which can then provide appropriate legal advice based upon such understanding. In addition, companies look to form a trusting relationship with a law firm, with which they can share confidential information.

With an increasing number of law firms providing high quality legal services these days, law firms are called to market their services to clients and potential clients ever more so than before. In this marketing effort, those law firms that know how the clients operate and what they seek are at a bigger advantage.

Through what appears to be a mutual need on the part of the companies and the law firms, the concept of integrating and partnering with clients has naturally developed. I would like to discuss some of the means by which this concept is implemented.

Photo by: Martin Molenkamp

Secondment Programs (Law Firm to Client)

Objectives

Many companies have a secondment program in place with law firms, where young lawyers spend some time at the companies' offices. In our case, we have had a secondment program with one American firm for over 10 years and with a U.K. firm for the last 2 years. This spring, we will have for the first time a secondee from a PRC law firm. These secondees spend a year to a year and a half as a member of the legal department. Through this secondment program, we most importantly look to the secondee as our lawyer to provide legal services for us (while we also understand that we are called to train the secondee from time to time). We also hope that during the program, the secondee would learn more about our company (*e.g.* the decision-making process, the corporate structure, the on-going projects and the personnel in charge).

And, we expect that the person would serve as an effective liaison between our company and the

law firm, not just during the secondment term but thereafter, so to strengthen the relationship between us and the firm.

From a law firm's point of view, it also expects the secondee to serve as a good liaison between itself and the client so that through the secondee, the firm can form a better relationship with the client, and be called to provide legal services for future projects.

Terms of Secondment

In terms of the qualification we look for, keeping our first objective in mind (*i.e.* to

receive legal service through the secondee), we always request a "mid-level associate," a lawyer who has been in practice for at least 3 to 4 years. We also ask for a transactional lawyer, rather than a litigation lawyer. In our case, the Japanese language ability is not required. In fact, we often ask for someone who does not speak Japanese.

The term of the secondment is usually 1 year, with a possibility to extend it for an additional 6 to 12 months.

During the program, the secondee remains the employee of the law firm (and preferably the Tokyo office of the firm), and therefore stays on the pay-roll of the firm. Accordingly, our company pays no compensation directly to the secondees. The amounts we pay the law firms are not the full salary amount and the difference is picked up by the firm. As the secondee remains the employee of the firm, the firm's malpractice liability insurance should also cover the secondee's performance while on secondment, and we ask for an indemnity from the firm as one of the provisions in the secondment agreement between ourselves and the firm.

Pros and Cons of Secondment Programs

Through the secondment program, we have established a very strong tie with one American firm. The members of its Tokyo office are fully familiar to us and they provide us with high quality legal service even when called upon on a short notice. In this case, the secondment program has certainly been a success. In other cases, we have had the relationship between ourselves and the law firm deteriorate due to the secondment program because of the secondee the firm sent.

In this fluid legal market, it is not unusual for lawyers to seek a new employment position after that person finishes our secondment program. However, remembering that we look to the secondee to act as a liaison not just during the term of the secondment but thereafter, it causes us concern when that secondee moves to a new firm (especially where not on his/her own volition) immediately upon expiry of the secondment term. Ideally, we would like to see the secondee spend several more years back at the firm and then make partner with the firm, thereby, in our view, solidifying our relationship even further with the firm.

From the firm's perspective, it can learn a great deal about its client through the secondment program. For instance, it can learn about new projects in the pipeline (which it can then market to get the work for) or who may have the authority to retain outside counsel. It can also form a relationship directly with the business departments who may call upon the firm in the future with new projects.

Sending an associate (especially a mid-level associate) to a company for at least a year is a tremendous financial commitment on the firm. When one calculates the hourly rate of such associate and the number of hours he/she is expected to bill, the resulting amount would certainly exceed the salary paid to the associate by

two-fold, if not more. Therefore, if the client pays only a portion of the secondee's salary, then the firm cannot even recover the cost. Accordingly, the secondment program must mean more to the firm than the profit the secondee would have brought to the firm had he/she stayed with the firm. This is the most difficult issue for the firm as often times in the initial years of the secondment program, the law firm loses money. Secondment programs must be viewed with a long-term goal in mind.

Internship Programs (Client to Law Firm)

Some firms and clients also have a relatively informal internship program where a relatively junior member of the legal department staff spends several months at the firm. The objective of this internship program is less precise than the secondment program discussed, however, the main objective seems to be to provide the intern with some sort of training with the firm.

During the internship program, the intern stays on the payroll of the client and the firm provides the intern with space and other administrative assistance. From the firm's point of view, the internship program is not nearly as beneficial as the secondment program. For one thing, the firm may not be able to bill the client (or other clients) for the work performed by the intern (especially if the intern is not a qualified lawyer). Unless the firm is committed to training the intern and there is a training program in place, often times the trainee ends up merely using an office space within the firm to study on his/her own.

Special Fee/Retainer Arrangement

Another way to partner with the client is to have a fee arrangement, other than the traditional hourly charge system. For instance, in Japan there is a "special counsel" system whereby a law firm is retained as a special counsel for a fixed fee per year. If there arises some simple legal questions to be asked, then the special counsel will perform the requested services, which will be covered by the retainer fee.

Other fee arrangements include a combination of a fixed fee and the hourly fee. In a project that is staged, the client may not wish to have the hourly fee system in place especially where there is still uncertainty as to whether the client will (or may) participate in the project. In such a case, the law firm may quote a fixed fee for a certain specified work to be performed in the initial stage (such as the bidding stage) and only in subsequent stages (such as the client obtaining the successful bid), charge on an hourly basis.

Alternative Approach to Departmentalization

In order to better understand the client's needs and to provide more comprehensive legal services, some firms have experimented with the concept of forming a team comprised of lawyers from various departments. Traditionally, law firms have been departmentalized, and a company using the firm's commercial department (notwithstanding that it has done so over the years) may not know about the capability of the firm's tax department or litigation department, and these departments may be independently marketing their services to the same company. In order to reduce this inefficiency, the team concept would operate much like a task force, centered around the client, where such task force would be comprised of lawyers with different expertise to identify the global needs of the client and to satisfy such needs.

Observation

It is often the case even with international large firms that they do not truly appear to grasp what the clients expect from them. At the same time, it is also rather difficult for the clients to fully understand a firm's capability and strengths. Accordingly, by integrating and partnering with each other, both the firm and the client can benefit a great deal. From my personal experience, the best system to implement such integration and partnering seems to be the secondment program, provided that both the firm and the client are highly committed to the success of the program.

[*Notes:*

1. This article is based on a paper presented by the writer at the Annual IPBA Conference in Hong Kong in May 2002. Copies of all papers presented at the Annual IPBA Conference are available from the IPBA Secretariat.
2. The views set out in this article are the writer's personal views and do not necessarily represent or reflect those of the company for which the writer works.]

Managing Internally-Generated Electronic Data

Communication via e-mail has been gaining popularity around the world, and proper management of electronically-generated data is of paramount importance. A sound data retention and destruction plan, coupled with a system that automatically executes the plan, will significantly reduce the risks involved in managing electronic data

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"Unmanaged electronic data is the biggest unfunded liability that companies face today."

– John Jessen, Electronic Evidence Discovery, Inc.

There are *three* basic things that can be done with yesterday's electronic documents, and *two* of them can land a law firm in trouble. Those two are (1) mentally consigning them to the "out of sight, out of mind" digital drawer, and (2) destroying them or failing to keep them for an adequate period of time. This article will focus on the *third* path – an intelligent electronic document retention and destruction plan.

Electronic Document Liabilities

Until recently, paper document systems dominated the law office scene. Now, electronic documents abound. Electronic document liabilities are essentially the same as those in paper document systems: the key difference lies in the significantly different technologies. Law firms expose themselves to enhanced liabilities when dealing with electronic documents because these documents (1) never seem to pile up, (2) are not automatically destroyed when "deleted" or placed in the "trash bin," and (3) may be partially or fully reconstructed by investigative technicians. However, by adopting and then vigilantly updating an electronic document retention and destruction plan, a law firm can reduce the risks associated with either maintaining or destroying electronic documents.

Maintaining Electronic Documents Creates Risks

When a firm develops a sound document retention policy, "it prevents obsolete, unnecessary or potentially harmful documents from lying around long enough to be subject to inevitable discovery." (see Sheila J. Carpenter & Shaunda A. Patterson, "Discovery of Electronic Documents", *E-Discovery & Procedure*, August 2000, at 8) If, for example, a law firm does not systematically destroy its e-mail, the risks of inadvertent disclosure or other "smoking gun" problems increase.

Destroying Electronic Documents Creates Risks

If a firm fails to retain its electronic documents in a systematic fashion, it may experience unnecessary costs and possible sanctions if it becomes burdensome to comply with production requests during discovery, and law firms have found little success in arguing that searching through or restoring vast amounts of stored data is unduly burdensome (see *Linnen v. A.H. Robbins & Co.* 1999 Mass. Super. LEXIS 240, 30).

The Need for an Electronic Data Retention Plan

If a sound retention policy is in place, a firm may use that policy as a defense both (1) against claims of evidence spoliation, and (2) against demands for burdensome or impossible document production. If no policy – or an inadequate policy – is in place, a court is more likely to sanction a law firm (a) for destroying or significantly altering evidence or, on the other hand, (b) for failing "to preserve property for another's use as evidence, in pending or future litigation." (see *Willard v. Caterpillar, Inc.* 40 Cal. App. 4th 892, 907 (1995), overruled by *Cedars-Sinai Med. Ctr. V. Superior Court* 18 Cal. 4th 1 (1998) (not affecting the California definition of

spoliation)) These sanctions range in severity. For example, the court may mandate that an adverse inference be made, that evidence be excluded, that monetary sanctions be imposed, or that dismissal or a default judgment be entered against the spoliating party (see Devin Murphy, "The Discovery of Electronic Data in Litigation: What Practitioners and Their Clients Need to Know", 27 *Wm. Mitchell L. Rev.* 1825, 1853-54 (2001) (citations omitted)).

In short, because law firms (and recently other professional service providers) face increased liabilities for both maintaining and destroying documents, they "must find a balance between saving everything and saving as little as possible." (see Carpenter & Patterson, *supra*, at 8)

Discovery Requests in Litigation

If a law firm finds itself party to an action in which electronic documents may play a role, the firm should be prepared to comply with electronic discovery requests. The following is a standard United States litigation discovery request list (see Murphy, *supra*, at 1840 n.119) that may be helpful in preparing a forward-looking electronic data retention policy.

General

1. Describe the types of computer system(s) used by your firm in the course of its business.
2. Describe/identify the type of software used on your computer system(s).
3. Identify the person(s) responsible for the ongoing operation, maintenance, expansion, backup and upkeep of the computer system.
4. Does the law firm staff [or, if relevant, the key witness] have home computers used for business purposes? (If yes, repeat questions 1-2.)
5. Are passwords or encrypted files used on any of the computer systems? If yes, describe how files are protected. Who could provide access codes if required?
6. Have you modified your use of computers to comply with recent discovery requests?

Backup and Retention

7. List all computer systems in the organization that are backed up.

   7.1 Describe the backup program(s) used. (*e.g.* ARCserve, StorageExpress, Maynard, Tecmar, etc.)

   7.2 Give details of your backup procedures.
8. Have you modified your backup procedures to comply with recent discovery requests?
9. Are files ever deleted from the computer system(s)?
10. Are archival backups ever created? If yes, what files have been archived? Where are the archival backups maintained?
11. Describe any disaster recovery plans in place now and for the relevant time period.

Maintenance and Access

12. Are utility programs used on computer(s) in the office? (*e.g.* Norton Utilities, MacTools, network maintenance programs) If yes, which program(s)? Has the program been used to permanently "wipe" files? When? Has the program been used to de-fragment, optimize or compress drives? When?
13. How do those outside of the company access the computers?
14. How are office computers secured?
15. Has any computer hardware been upgraded in the past 12 months?

16. Has any computer software been upgraded or replaced on office computers in the past 12 months?

Chain of Custody/Authentication

17. Are individual directories purged when an employee leaves the company?
18. Are passwords and access codes revoked when an employee leaves the company?
19. Are workstations reassigned to incoming employees? If yes:
20. Are hard drives wiped or re-formatted for the new user?

Photo by: Frank Wright

21. Are hard drives backed up before the new user takes system?
22. Describe how used or replaced equipment is disposed of or sold.
23. Describe how used disks or drives are treated before destruction or sale. (Degaussed? Shredded?)
24. Have you used outside contractors to upgrade either hardware or software? If so, please identify.
25. Are changes or modifications made to software recorded? Electronically? Are hard copy logs kept?

If you would have been able to respond to the above discovery requests without a sense of anxiety, your document retention policies are probably state of the art. If not, you may want to read further.

Popular Electronic Document Management Software

Modern law firms utilize a variety of software programs to manage electronic documents. Two of the most popular ones are PC Docs Inc.'s DOCS Open and Microsoft's Outlook. DOCS Open is a document management program which allows documents, created in a variety of applications such as WordPerfect and Excel, to be accessed by all members of the firm. The contents of the server on which the firm's documents are stored are backed-up regularly by its IT personnel onto (often multiple) storage devices. Firms often maintain a rotation system for its storage devices, keeping devices not currently in use at an off-site facility to assure that network files can be restored in case of a fire or other emergency. At the end of a brief period, each storage device is typically recycled and the backed-up server contents destroyed.

Typical DOCS Open Usage Problems

Law firms often have no permanent deletion program with respect to documents stored on DOCS Open. Although DOCS Open appears to archive documents (by default) for 60 days and offers other archiving options, some firms IT personnel only permanently delete a document if they are affirmatively asked to in writing (usually via e-mail). If no request is made, the document may be retained in DOCS Open indefinitely. If there is no separate policy as to DOCS Open retention/deletion issues, electronic documents may be retained as long as paper documents are retained, not infrequently as long as ten years.

Typical Microsoft Outlook Issues

Outlook is a Windows-based program used by many firms to manage their electronic mail. It allows lawyers who are connected to the network server to send and receive messages both internally and via the Internet outside of the network. As a Windows-based program, Outlook automatically stores e-mail messages after they are read (as opposed to UNIX-based systems which delete messages automatically).

An Outlook program can be set to transfer older e-mail messages automatically from the user's

machine into a temporary "trash" file on the firm's server. If the message is not retrieved from the trash file on the server within a specified time (often seven days), it is automatically purged from the system. However, because most firms' Information Technology personnel maintain rotating backup storage devices, a user could still potentially retrieve a "purged" e-mail message for an even longer period. Further, because Outlook is not programmed to distinguish between official (firm business) and unofficial (personal) e-mail, and because typically each law firm user has only one firm e-mail account (instead of a firm business account and a personal account), saving firm business e-mail and deleting personal e-mail is difficult to implement, and it is the personal e-mail that often contains information of interest to adversaries.

Guidelines for an Electronic Data Retention Policy

To strike a balance between saving everything and saving as little as possible, prudent law firms should consider the following retention policy guidelines.

General Electronic Data Retention Policy

Adopt an electronic document retention policy. Simply having a policy may be deemed a mitigating factor in litigation when documents are destroyed pursuant to the policy; whereas failing to have a neutral retention policy in place may be an aggravating factor (see Ian C. Ballon, "Spoliation of E-Mail Evidence: Proposed Intranet Policies and a Framework for Analysis", *Cyberspace Lawyer* Vol. IV, No.1, March 1999).

Similar to a standard, non-electronic or paper retention policy, an electronic policy should:

(1) be reasonable (considering the facts and circumstances surrounding relevant documents);

(2) set reasonable retention periods (*e.g.* periods that are at least as long as any applicable statute of limitations or regulatory review period);

(3) not be adopted in bad faith (*e.g.* at the last minute or with a specific set of documents in mind);

(4) provide for easy access to stored documents (to ease time and cost burdens) by specifying what files are to be saved, and where they will be stored;

(5) outline the document destruction process;

(6) promote or legitimize business interests, such as document storage control; and

(7) be flexible enough to be adjusted over time (*e.g.* when lawsuits are likely to be filed or when new statutes or case law impose additional retention requirements).

(See Carpenter & Patterson, *supra*; Gilbert S. Leeds & Peter A. Marra, "Discovering and Preserving Electronic Evidence", *New Jersey L.J.*, 17 April 2000; Murphy, *supra*, at 1857.)

E-mail Data Retention System

Adopt an e-mail retention and destruction system, rather than a policy. A policy allows user discretion in the decision to destroy or retain e-mail records. A system, on the other hand, employs neutral technology to purge all historic e-mails (other than official firm business communications, which pursuant to firm policy, should be retained).

The e-mail system should:

(1) have a method to differentiate official e-mail from unofficial or personal e-mail. This can be done in any one of a number of ways. For example: use e-mail software that requires the user to identify the communication as either official or unofficial; assign employees two separate e-mail accounts – one for official business and the other for personal or administrative communications; or require that official e-mail be printed (perhaps automatically) and the hard copy filed;

(2) at regular intervals, automatically delete e-mail in all in-boxes and out-boxes sent earlier than a pre-determined time (*e.g.* 30 or 60 days);

(3) do not save historic e-mail on any servers or backup storage devices, and regularly overwrite backup storage devices so that at any given time, a company only has e-mail records for the preceding week or two (see Ballon, *supra*);

(4) label every official e-mail message as privileged information to prevent inadvertent disclosures or waivers;

(5) put very sensitive information on paper, which is easier to destroy permanently, rather than in e-mail because "[e]ven if it's deleted, technology experts can go under many layers of underwriting and find the e-mail message" (see James Pabarue, "Four Precautions Can Protect the Firm Against E-Mail Risks", *Law Office Administrator*, April 1999, at 7-8);

(6) place the firm's e-mail retention policy in the employee handbook. Also, post it on the firm's intranet site or newsletter, or in an internal memo;

(7) remind the firm's employees with a blanket statement that "internal e-mails are confidential, and the information system is the property of the law firm" every time each employee boots up his or her system (see Pabarue, *supra*); and

(8) keep abreast of technological developments designed to reduce e-mail archiving problems.

New Technological Developments

An example of such a technological development is San Francisco-based Disappearing, Inc.'s software product that permanently destroys any electronic e-mail wherever it may be (as opposed to just destroying e-mail within a firm's own system). The author of the e-mail pre-determines when the e-mail "ink" should disappear. (See Karyl Scott, "Disappearing, Inc. May Ease E-Mail Worries", *InformationWeek* (25 August 2000), available at http://content.techweb.com/wire/story/TWB20000825S0010.)

Also, unlike previous data reconstruction work in which experts compiled residual data from desktop hard drives or network server logs, technicians now are developing means to reconstruct even purged or overwritten electronic data. Of course, other technicians are developing means to render this data even less reconstructable. The law has not directly dealt with these cutting-edge developments yet. The current trend in the law is to consider purged electronic data which is destroyed pursuant to a reasonable and legitimate purpose to be out of discoverable reach (see *Linnen v. A.H. Robbins Co.*, *supra*).

Conclusion

Knowing which electronic documents to retain and which to destroy is the basis of an intelligent electronic document management plan. Equally important, however, is the adoption and periodic updating of a system that makes implementation of the plan virtually automatic. The combination of a reasonable plan and an automatic system will substantially reduce the risks involved in maintaining electronically-generated electronic data.

[*Note from the author:* While this article cites United States sources and cases, its underlying principles are applicable anywhere.]

INTER-PACIFIC BAR ASSOCIATION

M.S. Lin Scholarships

The Inter-Pacific Bar Association is pleased to announce the establishment of the M.S. Lin Scholarship Programme to enable practicing lawyers to attend the IPBA's Thirteenth Annual Meeting and Conference in 2003.

What is the Inter-Pacific Bar Association?

The Inter-Pacific Bar Association (IPBA) is an international association of business and commercial lawyers with a focus on the Asia-Pacific region. Members are either Asia-Pacific residents or have a strong interest in this part of the world. The IPBA was founded in April 1991 at an organising conference held in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since that time, it has grown to become the pre-eminent organization in the area of Asia law and business with a membership of approximately 1,800 lawyers from 70 jurisdictions around the world. Lawyers in most law firms in the Asia-Pacific region that have a cross-border practice are members of the IPBA.

What is the Inter-Pacific Bar Association Annual Meeting and Conference?

The highlight of the year for the IPBA is its annual multi-topic four day conference. The conference has become the "must attend event" for business and commercial lawyers in the region. In addition to plenary sessions of interest to all lawyers, programmes are presented by the IPBA's 17 specialist committees. The IPBA annual meeting and conference provides an opportunity for lawyers throughout the region to get to know each other better and to increase their legal knowledge and practice skills. Previous annual conferences have been held in Tokyo (twice), Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver and Hong Kong, attracting as many as 700 lawyers plus accompanying persons.

What are the M.S. Lin Scholarships?

The M.S. Lin Scholarships were created to honour the memory of M.S. Lin of Taiwan, who was one of the founders and a past President of the IPBA. The purpose of the M.S. Lin Scholarships is to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from, attending the conference.

Who is eligible to be an M.S. Lin Scholar?

[1] Lawyers from Developing Countries

To be eligible, the applicants must:

(a) be an indigenous lawyer in Vietnam, Laos, Cambodia, Myanmar, Mongolia or the Pacific Islands;
(b) be fluent in both written and spoken English (given this is the conference language); and
(c) currently be involved in a cross-border practice or wish to become engaged in a cross-border practice.

[2] Young Lawyers

To be eligible, the applicants must:

(a) be under 35 years of age **and** have less than five years of practice;
(b) be fluent in both written and spoken English (given this is the conference language);
(c) have taken an active role in the legal profession in their countries;
(d) currently be involved in a cross-border practice or who would like to become engaged in a cross-border practice; and
(e) have published an article in a reputable journal on some topic related to the work of one of our committees or provide some other objective evidence of committed involvement in the profession.

Preference will be given to those applicants who could not otherwise attend the conference, for example, because of personal or family financial circumstances and/or because they are working for a small firm which could not afford to send them to the conference. Applicants from multi-national firms will normally be considered only if they have a substantial part of their attendance expenses provided by their firm.

In order to spread the benefit of these scholarships further, applicants should set out the amount you or your firm could pay towards the airfare and conference fee, taking into account your personal and family circumstances and your firm's situation.

Each M.S. Lin Scholar will receive:

1. Return economy class transportation from the scholar's home city to the Conference venue city.
2. Waiver of the 13th Annual Conference registration fee.
3. Accommodation in a conference hotel for four nights.
4. *Per diem* living expenses of $20 per day.
5. Waiver of IPBA annual membership fees for 2003, 2004 and 2005.

How does one apply to be an M.S. Scholar?

To apply for an M.S. Lin Scholarship, please obtain an application form and return it to Kaori Hashimoto at the IPBA Secretariat in Tokyo no later than 30 September 2002. Application form is available either through the IPBA website (www.ipba.org) or at the IPBA Secretariat.

Please send applications to the IPBA Secretariat at:

2/F Prime Square City
1-1-7 Hiroo, Shibuya-ku
Tokyo 150-0012, Japan

Telephone: (+81 3) 3409-2381
Facsimile: (+81 3) 3409-2033
E-mail: ipba@tga.co.jp

What happens once a candidate is selected?

The following procedures will apply after selection:

1. The Secretary-General will notify each successful applicant that he or she has been awarded an M.S. Lin Scholarship. The notification will be provided at least two months prior to the opening of the conference. Unsuccessful candidates will also be notified.
2. Airfares and accommodation will be arranged by the 13th Annual Conference Host Committee and/or the IPBA Secretariat after consultation with the successful applicants.
3. A liaison person for each Scholar will be arranged. The liaison person will be available to the Scholar to introduce him or her to the IPBA and generally help the Scholar obtain the most benefit from the conference.

INTER-PACIFIC BAR ASSOCIATION

An Invitation to Join the Inter-Pacific Bar Association

The IPBA is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organizing conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1,800 members from 70 jurisdictions, and it is now the pre-eminent organization in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economics. As companies throughout the region become part of the global economy they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organizations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees listed overleaf. All of these committees are active and have not only named chairs, but a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic 4-day conference, usually held in the first week of May each year. Previous annual conferences have been held in Tokyo, Sydney, Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver and Hong Kong, attracting as many as 700 lawyers plus accompanying guests.

The IPBA has organized regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also cooperated with other legal organizations in presenting conferences – for example, on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

The IPBA also publishes a membership directory and a quarterly *IPBA Journal*.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- Standard Membership ..... US$125 / ¥18,000
- Three-Year Term Membership ..... US$325 / ¥46,000
- Lawyers in developing countries with low income levels ..... US$ 75 / ¥10,800
- Young Lawyers (under 30 years old) ..... US$ 50 / ¥ 7,200

Annual dues will cover the period of one year starting from January 1 and ending on December 31. Those who join the Association before August 31 will be registered as a member for the current year. Those who join the Association after September 1 will be registered as a member for the rest of the current year and for the following year.

Qualified lawyers who attend the IPBA Annual Meeting and Conference and pay the non-member conference fee will be automatically registered as a member for the then current year ending on December 31.

Membership renewals will be accepted until July 31.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues shall be charged by the Secretariat.

Membership dues from 1996 to 2002 will be waived for indigenous lawyers from Cambodia, Myanmar, Vietnam and Laos who are, or who are interested in, handling business and commercial matters that are cross-border or that involve a foreign party.

Further, in order to encourage young lawyers to join the IPBA, a Young Lawyers Membership category (age under 30 years old) with special membership dues has been established.

IPBA has established a new 3-Year Term Membership category which will come into effect from the 2001 membership year.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the Association by submitting an application form accompanied by payment of the annual subscription of (¥50,000/US$500) for the then current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ("Associate Member"), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges of a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates ..... US$500 / ¥50,000

Payment of Dues

Payment of dues can be made either in US dollars or Japanese yen. However, the following restrictions shall apply to payments in each currency. Your cooperation is appreciated in meeting the following conditions.

A US dollar check should be payable at a US bank located in the US. US dollar check payable in Japan may be returned to sender depending on charges.

A Japanese yen check should be payable at a Japanese bank located in Japan.

Japanese yen dues shall apply to all credit card payment. Please note that the amount charged will not be an equivalent amount to the US dollar dues.

Please do not instruct your bank to deduct telegraphic transfer handling charges from the amount of dues. Please pay related bank charges in addition to the dues.

See overleaf for membership registration form

IPBA SECRETARIAT

Prime Square City 2/F, 1-1-7 Hiroo, Shibuya-ku, Tokyo 150-0012, Japan
Tel. 81-3-3409-2381 Fax. 81-3-3409-2033 E-Mail: ipba@tga.co.jp

IPBA MEMBERSHIP REGISTRATION FORM

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[ ] 3-Year Term Membership ..... US$325 or ¥46,000
[ ] Lawyers with low income levels in developing countries ..... US$ 75 or ¥10,800
[ ] Young Lawyers (under 30 years old) ..... US$ 50 or ¥ 7,200

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